

**FORMS OF AGREEMENTS IN THE CIVIL CODE THAT
CAUSE COLLABORATION IN THE PROCUREMENT OF
GOODS AND SERVICES**

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ABSTRACT

The Civil Code divides the agreement into 2 parts, named agreements and unnamed agreements. These agreements are sometimes used for tenders related to the procurement of goods and services. These forms of agreements are often used by tender participants to create a pseudo-business competition. Pseudo-business competition is commonly used to win a tender. So that this research will focus on the forms of agreements that are often used in the procurement of goods and services in Indonesia through the perspective of Law Number 5 of 1999. This research is a normative juridical research using descriptive analysis. In this study, a comprehensive, systematic and in-depth picture of a situation or signs that are studied about all related matters. Named agreements and unnamed agreements have legality in Indonesian positive law, but agreements are not allowed to be made in the procurement of goods and services, because they will violate the provisions of Article 22 with the type of horizontal conspiracy that has been detailed through the Regulation of the Business Competition Supervisory Commission Number 3 of 2023 with the type of horizontal conspiracy and violates Articles 6 and 7 of Presidential Regulation No. 16 of 2018 as amended by Presidential Regulation No. 12 of 2021, so that the agreement is null and void .

Keywords: Agreements, Conspiracy, Procurement of Goods and Services.

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INTRODUCTION

The Civil Code regulates agreements in Article 1313¹, in terms of the forms of agreements are divided into named agreements or commonly known as *nominat* and unnamed agreements commonly known as *innominate*.² In Book III of the Criminal Code it is stated that a named contract is a rental contract, barter, sale and purchase, gift, deposit of goods, loan for use, borrowing and lending, granting of power of attorney, guaranteeing debts, and peace.³ While an anonymous agreement is an agreement that arises, grows and develops in society, so it is not yet recognized in the Law Book. Civil Law Act.⁴

Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition regulates tender collusion as stated in Article 22.⁵ Tender Collusion is classified into several types, such as horizontal collusion, Vertical Collusion, Vertical and Horizontal Collusion, and Collusion in other forms.⁶ In terms of procurement of goods and services, tender participants often do prohibited things in order to obtain the tender, to the point that Setya Budi Arianta, an expert in procurement of goods and services, explained that many tender participants use borrowing, lending, borrowing names, and renting business entities to create false business competition.⁷

Based on the description, it can be seen that many forms of agreements are used by business actors who participate in procurement of goods and services tenders to win the auction, so that later this research will be able to identify and analyze the forms of agreements that have an impact on tender collusion.

METHOD

The type of legal research used by the author in compiling this research is normative legal research. It is said so because this research is related to law or legal research which will always lead to normative nature and should be stated what the

¹Civil Code

²Ahmadi Miru, Sakka Pati, *Contract Law Explanation of the Meaning of Named Contract Articles in the Civil Code (BW)*, (Jakarta: Sinar Grafika, 2020) p. 24

³Azahery Insan Kamil, Pandji Ndaru Sonatra, Nico Pratama, Contract Law in Comparative Perspective (Highlighting Named Agreements with Unnamed Agreements), *Serambi Hukum Journal* Vol. 08, No. 02 January 2015.

⁴Made Ester Ida, *Implementation of the Work Contract between the Government of the Republic of Indonesia and the Limited Liability Company (PT) Avocet Bolaang Mongondow*, Thesis of the Master of Notary Study Program, Diponegoro University, 2008. p. 72.

⁵ Law No. 05 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition .

⁶Regulation of the Chairman of the Republic of Indonesia Business Competition Supervisory Commission Number 3 of 2023 concerning Guidelines for the Prohibition of Collusion in Tenders

⁷Muhammad Yasin, "Be Careful Lending the Company's "Flag" in Procurement of Goods and Services", Be Careful Lending the Company's 'Flag' in Procurement of Goods and Services (hukumonline.com), May 22, 2024.

approaches and legal materials are.⁸ Therefore, the author uses library research techniques to collect research data, namely by searching and collecting data or reading sources that are scientific in nature and are still related or in line with the title of this research, so that they can be used as a basis for research and analysis of the problems faced. As a normative legal research, it is certain to use a statute approach.⁹

DISCUSSION

Forms Of Agreement In The Civil Code

1. Named Agreement

Self-named agreements are regulated in Article 1319 of the Civil Code, which means that all agreements, whether they have a special name or are known by a certain name, are subject to the general regulations contained in this chapter and the previous chapter.¹⁰

In general, the named agreement includes several forms of agreements such as, sale and purchase agreements, barter, lease, work, civil partnership, association, grant, deposit of goods, loan, fixed and eternal interest, profit, grant of power of attorney, guarantor of debt and peace. In this agreement there are elements, The elements in the agreement or contract include:¹¹

a. *Essential* Elements

The essential element in an agreement is an element that must always be present in an agreement, an absolute element, without which the agreement would not be possible.

b. *Natural* Elements

Naturalia elements are elements that commonly exist or are inherent characteristics of agreements so that they are secretly attached to the agreement.

c. *Accidental* Elements

Accidental element is an element that must be expressly agreed/promised in an agreement that will be made by the parties who will bind themselves.

In this case, the agreement with this name must still fulfill the valid requirements for an agreement with this name as stipulated in Article 1320 of the Civil Code, including:¹²

a. Agree those who bind themselves

⁸Peter Mahmud Marzuki, *Legal Research*, (Jakarta: Kencana, 2019) p. 58

⁹Bambang Synggono, *Legal Research Methods*, (Jakarta: Raja Grafindo Persada, 2016) p. 45

¹⁰Azahery Insan Kamil, Op. Cit.

¹¹Munir Fuady, *Contract Law (from a Business Law Perspective)*. (Bandung: Citra Aditya Bhakti 2007). p. 29

¹²Subekti, *Law of Contracts*, (Jakarta: Intermasa, 2005), p. 14

- b. Able to make an agreement
- c. Regarding a particular matter; and
- d. A lawful cause

Based on this, all forms of Named agreements that have been described above must fulfill the elements and requirements for a valid agreement so that it has legal force for the parties who bind themselves.

2. Anonymous Agreement

Unnamed agreements are regulated in Article 1319 of the Civil Code, which reads: "all agreements, whether they have a special name or are not known by a certain name, are subject to the general regulations contained in this chapter and other chapters". An Unnamed Agreement is an agreement that arises, grows and develops in society, so that it is not yet recognized in the Civil Code.¹³

The formation of this agreement is usually formed based on the Principle of Freedom of Contract as regulated in Article 1338 of the Civil Code which states that: "All agreements made legally are valid as law for those who make them." The principle of freedom of contract gives freedom to other parties to make or not make an agreement, enter into an agreement with anyone, determine the content of the agreement, and determine the form of the agreement. What you need to know is that freedom to enter into an anonymous agreement is permissible as long as it does not violate law, propriety or order, generality, and decency.¹⁴

An anonymous agreement must still fulfill the requirements for a valid agreement as stipulated in Article 1320 of the Civil Code, including:¹⁵

- a. Agree those who bind themselves
- b. Able to make an agreement
- c. Regarding a particular matter; and
- d. A lawful cause

In the context of procurement of goods and services tenders, the agreement that is often used is a name borrowing agreement (*nominee*). According to R. Subekti, a nominee agreement can be equated with a simulation agreement or a pretend agreement made by several parties that shows as if there is an agreement between the parties, but in fact it is hidden,¹⁶ so a name borrowing agreement can be categorized as a form of legal smuggling by the parties, which in its implementation is feared will give rise to unlawful acts.

¹³Made Ester Ida, Op. Cit.

¹⁴Hariato, D. "The Principle of Freedom of Contract: Problems of Its Implementation in Standard Contracts Between Consumers and Business Actors". *Samudra Keadilan Law Journal* , 11(2), 145–156. (2016).

¹⁵Subekti, Op. Cit

¹⁶Silaban, J, "Notary's Accountability in Making Deeds of Borrowed Names (Nominee Arrangements) by Foreign Citizens Related to Ownership of Land Rights in Indonesia, (2019).

Conspiracy In The Procurement Of Goods And Services

Procurement of Goods and Services in Indonesia is regulated by Presidential Regulation Number 12 of 2021 concerning Amendments to Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods/Services. This Presidential Regulation is intended to provide guidelines for regulating procedures for procurement of goods and services that are simple, clear and comprehensive, in accordance with good governance. In the context of legal development, government procurement of goods/services activities reviewed from the perspective of Indonesian law have an important meaning with arguments such as:¹⁷

- a) Government procurement of goods and services has strategic significance in terms of protection and preference for domestic business actors.
- b) Government procurement of goods and services is a significant sector in economic growth efforts.
- c) A government procurement system that is able to implement the principles of good governance will encourage efficiency and effectiveness of public spending while conditioning the behavior of the three pillars, namely government, private sector and society in implementing good governance.
- d) That the scope of government procurement of goods and services covers various sectors in various aspects of national development.

Government procurement of goods and services, both based on national and international law, must be based on healthy competition, transparency, efficiency and non-discrimination.

In the Election Document Model regulated in LKPP Regulation Number 12 of 2021, a prohibition on collusion and its indications will also be found. This prohibition can be seen in Chapter III Instructions to Participants number (4), namely:

"Participants in the selection are obliged to comply with procurement ethics by not carrying out actions that indicate collusion with other Participants to arrange the bid price and/or Tender results, thereby reducing/hindering/reducing/eliminating healthy business competition and/or harming other parties."

Furthermore, in point (5) of the same chapter, it is emphasized that all parties in carrying out their duties, functions and roles must avoid and prevent conflicts of

¹⁷Muhammad Fahrudin, 2023, "Law Enforcement in Government Procurement of Goods/Services According to Presidential Regulation Number 12 of 2021 Concerning Amendments to Presidential Regulation Number 16 of 2018 Concerning Government Procurement of Goods/Services", (CASE STUDY OF SURABAYA PTUN DECISION NUMBER 200/B/2021/PT.TUN.SBY), Veritas Jurnal Program Pascasarjana Ilmu Hukum, vol. 9 No. 1 Tahun 2023, p. 146.

interest between the related parties, both directly and indirectly, which result in unhealthy business competition in the Procurement of Goods/Services.¹⁸

If connected with law number 5 of 1999 regulates tender collusion which is included in the category of prohibited activities in Article 22 of the Law. Article 22 uses the *rule of reason approach*. In this case, collusion referring to Article 22 states: "Business actors are prohibited from colluding with other parties to arrange and/or determine the winner of a tender so that it can result in unfair business competition. "

This law also provides a definition of collusion. Based on Article 1 number 8 of Law No. 5 of 1999, what is meant by collusion is a form of cooperation carried out by business actors with other business actors with the intention of controlling the relevant market for the benefit of the colluding business actors.¹⁹

The Business Competition Supervisory Commission as a business competition law enforcement agency that operates based on its duties and authorities, has issued a number of KPPU guidelines, including the Business Competition Supervisory Commission Regulation Number 2 of 2010 concerning Guidelines for Article 22 of Law Number 5 of 1999 concerning the Prohibition of Collusion in Tenders, which was then amended to the Business Competition Supervisory Commission Regulation Number 3 of 2023 concerning Guidelines for the Prohibition of Collusion in Tenders.

Article 22 of the Guidelines distinguishes tender collusion into four types, namely horizontal collusion, vertical collusion, a combination of vertical and horizontal collusion, and collusion in other forms as follows:²⁰

- a. Horizontal collusion is a conspiracy that occurs between business actors or providers of goods and services with fellow business actors or providers of goods and services competitors, this conspiracy can be categorized as a conspiracy by creating pseudo-competition among tender participants.

¹⁸Sastyo Aji Darmawan, Detecting Collusion from Price Bidding Patterns, *Journal of Procurement of Goods/Services*, 2022, page 2.

¹⁹Dewi Meryanti, Monopolistic Practices in the Clean Water Industry on Batam Island Reviewed from Business Competition Law (Case Study of Case No. 11/KPPU-I/2008 Concerning Monopolistic Practices by PT. Adhy Tirta Batam), Thesis, Postgraduate Program, Faculty of Law, University of Indonesia, 2012, Jakarta, p. 52

²⁰Regulation of the Business Competition Supervisory Commission Number 3 of 2023 Concerning Guidelines for the Prohibition of Collusion in Tenders

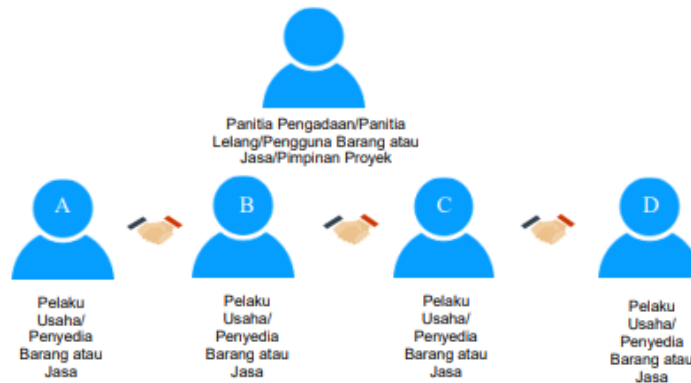


Figure 1. Horizontal Collusion Scheme

- b. Vertical collusion is a conspiracy that occurs between one or several business actors or providers of goods and services with the tender committee or auction committee or user of goods and services or owner or employer. This conspiracy can occur in the form where the tender committee or auction committee or user of goods and services or owner or employer collaborates with one or several tender participants.

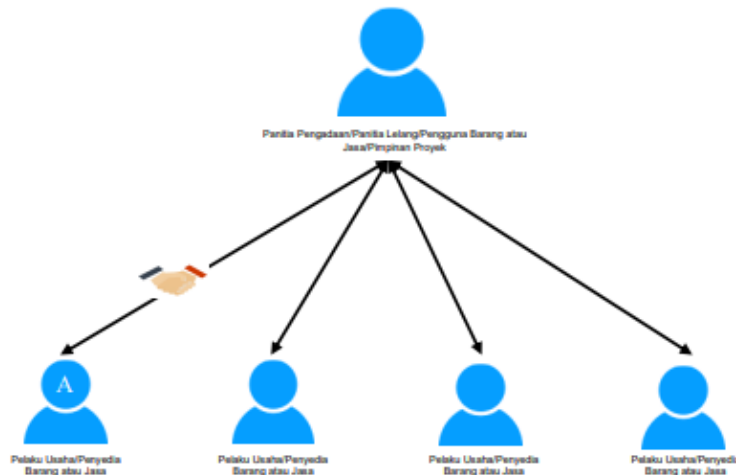


Figure 2. Vertical Collusion Scheme

- c. Horizontal and vertical collusion is a collusion between the tender committee or auction committee or users of goods and services or owners or employers with business actors or providers of goods and services. This collusion can involve two or three parties involved in the tender process. One form of this collusion is a fictitious tender, where both the tender committee, employers, and business actors carry out a tender process that is only administrative and closed.

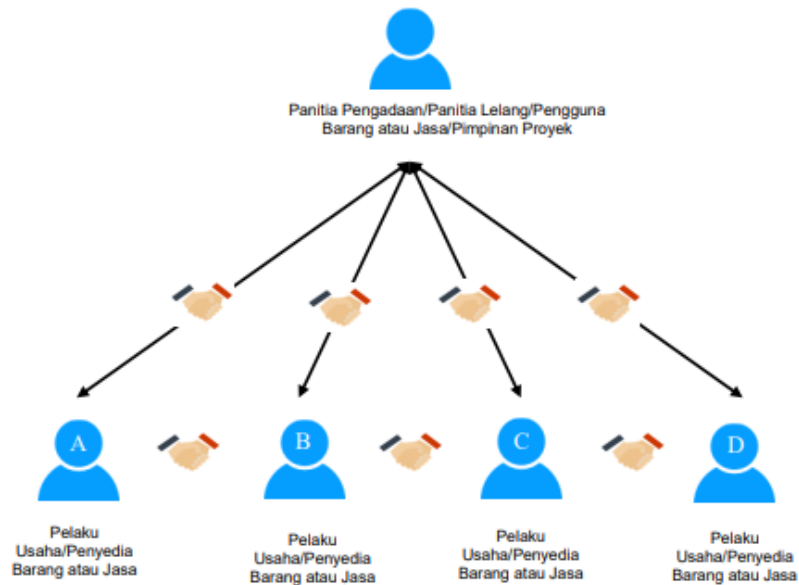


Figure 3. Horizontal and Vertical Collusion Scheme

- d. Collusion in other forms is a Collusion involving one or more other parties including parties who do not participate in the Tender process who function as scenario organizers/funders/liaisons/brokers and/or other roles to organize and/or determine the tender winner. Collusion in other forms also includes fictitious tenders where both the Tender committee, employer, and Business Actors carry out a Tender process only administratively and in secret

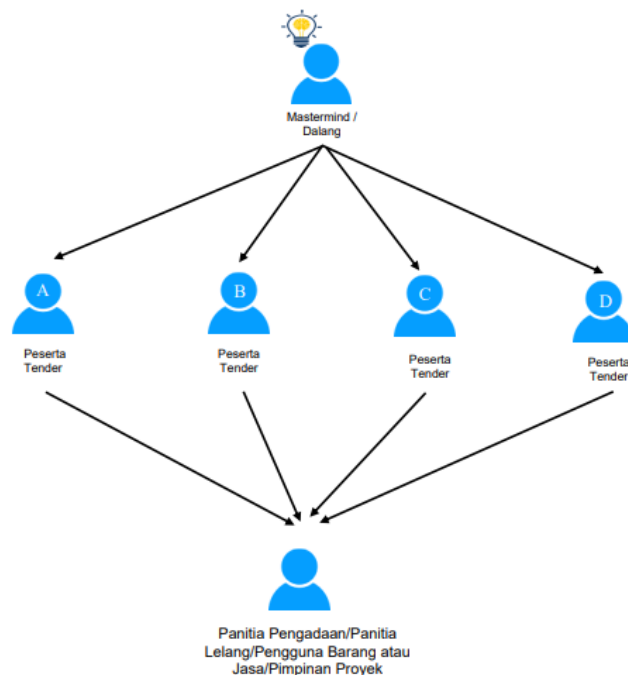


Figure 4. Collusion Scheme in other forms

The Face of Tender Rigging in the Last 5 Years

| No. | Decision | Form of Conspiracy |
|-----|----------------|---|
| 1. | 15-KPPU-L-2023 | There are 4 reported parties, T-2 and T-3 were borrowed by T-1 (Horizontal) |
| 2. | 08/KPPU-L/2023 | T-1, T-2, and T-4 were borrowed by T-3 and the Working Group facilitated (Joint) |
| 3. | 18/KPPU-L/2022 | Tender participants cooperate to determine the tender price (document similarity), and the working group allows (Combination) |
| 4. | 17/KPPU-L/2022 | T-1 and T-2 (Working Group) are facilitated by Working Group (Vertical) |
| 5. | 25/KPPU-I/2020 | T-2, T-3, T4, borrowed by the company T-1 and the Working Group facilitates (Joint) |
| 6. | 35/KPPU-I/2020 | T-1 and T-2 Cooperation in preparing tender documents and Working Group facilitating (Joint) |
| 7. | 32/KPPU-I/2020 | Cooperation in preparing tender documents (T-1 and T-2 have family ties) and the Working Group facilitates (Joint) |
| 8. | 36/KPPU-I/2020 | T-1 and T-2 Cooperation in preparing tender documents and Working Group facilitating (Joint) |
| 9. | 24/KPPU-I/2020 | T-1 and T-2 Cooperation in preparing tender documents and Working Group facilitating (Joint) |
| 10. | 28/KPPU-I/2020 | Cooperation in preparing tender documents (T-1 and T-2 have family ties) and the Working Group facilitates (Joint) |
| 11. | 04/KPPU-L/2020 | T-2, T-3, and T-5 were borrowed by T-1 and the facilitating working group (Joint), but the commission panel only found T-1 and the working group guilty. |
| 12. | 05/KPPU-I/2020 | creating a pseudo business competition by making the 2 reported parties (T-2 and T-3) as supporting companies and the working group facilitating (Joint) |
| 13. | 30/KPPU-I/2019 | cooperation in making tender documents (T1, T2, T3 owned by 1 person) there is also company lending and borrowing in T4 and the working group facilitates (Joint) |
| 14. | 22/KPPU-I/2019 | Similarity of documents and Similarity of Shareholders (T1, T2, T3 owned by 1 person) and Working Group facilitates (Joint) |

| | | |
|-----|----------------|--|
| 15. | 14/KPPU-1/2019 | The Working Group allowed several documents of tender participants that were not in accordance and T-1 and T-2 (KSO) carried out post bidding (Combined) |
|-----|----------------|--|

Table 1. KPPU Decisions in the Last 5 Years

It can be seen through the table that has inventoried and identified various forms of tender collusion, from all of these decisions there are 6 decisions involving a borrowing scheme or borrowing the name of a business entity, 2 decisions involving the position of shareholders in different companies participating in the tender, 1 decision related to the involvement of a companion company to win a tender, 2 decisions related to family relationships between tender participants, 1 decision related to collusion between tender participants to set the bid price, and 3 decisions related to cooperation between tender participants in preparing tender documents in the procurement of goods and services.

Referring to this, it can be seen that the scheme of borrowing/borrowing the name of a business entity in the procurement of goods and services tenders is something that often occurs, and this indicates that the ecosystem for the procurement of goods and services in Indonesia is still far from the expectations and actions of business actors who still do not care about national economic development.²¹

CONCLUSION

Agreements are a common occurrence in Indonesia. The agreement will be the law of the party bound by the agreement. The Civil Code (Civil Code) hints that there are two forms of agreements, namely named agreements (*nominaat*) and unnamed agreements (*inominaat*). These two forms of agreements are allowed under national law as long as they meet the conditions for the validity of the agreement. Regarding the conditions for the validity of the agreement in accordance with the provisions stipulated in Article 1320 of the Civil Code.

The procurement of goods and services often creates competition for tenderers. Not a few, the findings of ICC often find things that lead to conspiracies and monopolies. The methods that are often used are through loan agreements using the name of business entities to create pseudo-business competition. This certainly violates the provisions of Article 22 with the type of horizontal conspiracy that has been detailed through Commission Regulation No. 2 of 2010 with the type of horizontal conspiracy and violates as well as Articles 6 and 7 of Presidential Regulation No. 16 of 2018 as amended by Presidential Regulation No. 12 of 2021,

²¹Muhammad Anggi Nasution, Analysis of Business Entity Borrowing Practices in Procurement of Goods and Services Tenders (Study of KPPU Decision No. 04/Kppu-L/2020), Master of Law Thesis, University of North Sumatra, p. 111

so that the agreement is null and void. Therefore, it can be concluded that every named or unnamed agreement, in this case, borrowing, using, and borrowing the name of a business entity, is an agreement that is null and void if it contains the intention to conduct unfair business competition.

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